RECOVERY UNDER WORKMEN'S COMPENSATION ACTS FOR INJURY ABROAD

WORKMEN'S compensation acts have for the most part been held to permit recovery for injuries or death suffered abroad; these holdings are consistent with the nature of the rights and duties created by the acts. An employee, acting under a contract of hire made in a state where there is a workmen's compensation act, goes into another state or country and is there injured or killed under circumstances which, apart from the jurisdictional question, entitle him or his dependents to compensation under the act of the state where the contract was made. The jurisdiction where he is killed or injured may also have a compensation act. May there be recovery of compensation, and if so, by the law of which jurisdiction? The rapidly growing number of decisions under the compensation acts of over thirty American states and of other jurisdictions of Anglo-American law show that this question is no mere academic puzzle.

In general our law is territorial and not personal.[1] This does not mean that rights and duties can be enforced only in the territory of the jurisdiction which created them; it does mean that such law does not ordinarily purport to create rights and impose duties by reason of acts, to which legal consequences may be annexed, occurring beyond the geographical confines of its territory.

[1] Whitford *v.* Panama R. Co., 23 N. Y. 465, 471 (1861): "*Prima facie* all laws are coextensive, and only coextensive with the political jurisdiction of the law-making power." Davis *v.* N. Y. & N. E. R. Co., 143 Mass. 301, 303, 9 N. E. 815 (1887): "It must certainly be the right of each state to determine by its laws under what circumstances an injury to the person will afford a cause of action." Howarth *v.* Lombard, 175 Mass. 570, 572, 56 N. E. 888 (1900): "The fundamental question is whether there is a substantive right originating in one state and a corresponding liability which follows the person against whom it is sought to be enforced in another state. Such a right, arising under the common law, is enforcible everywhere. Such a right arising under a local statute will be enforced *ex comitate* in another state, unless there is a good reason for refusing to enforce it. It will be enforced, not because of the existence of the statute, but because it is a right which the plaintiff legitimately acquired, and which still belongs to him." Mulhall *v.* Fallon, 176 Mass. 266, 268, 57 N. E. 386 (1900): "It is true that legislative power is territorial, and that no duties can be imposed by statute upon persons who are within the limits of another State."

From this arises the presumption that, in the absence of clear indications to the contrary, a statute has no extraterritorial effect.[2]

A. The Optional Statutes

Optional statutes, by far the most common in this country, rest upon the actual or implied expression of consent thereto of employer or employee or both. Some of these acts provide that the employer shall pay compensation under stated conditions of employment where one or both parties give affirmative notice of their election to come under the act.[3] The majority provide that the obligation to pay compensation under the stated conditions shall exist unless the parties file written notice of their election not to operate under the act. In either case there are certain penalties imposed for electing to remain under the common-law system. The distinction between the two types is immaterial, as each depends in the last analysis upon the consent of the parties, and each may therefore be termed optional.

In the absence of a compensation act in the state of the injury, may there be a recovery of compensation under the act of the home state? If the statute be construed not to provide compensation for injuries, etc., abroad, there can then clearly be no recovery.[4]

Before the question under an act of opposite intent and construction can be answered, one must inquire somewhat into the nature of the basis of workmen's compensation. Text-writers and courts have demonstrated that the right to claim and the duty to pay compensation do not arise out of tort.[5] It is sufficient to

[2] Gould's Case, 215 Mass. 480, 484, 102 N. E. 693 (1913): "In the absence of unequivocal language to the contrary, it is not to be presumed that statutes respecting this matter [workmen's compensation] are designed to control conduct or fix the rights of parties beyond the territorial limits of the state." Maxwell, Interpretation of Statutes, 4 ed., 212.

[3] Mich., Acts 1912, ch. 63, Pt. I, § 6; Mass., Acts 1911, ch. 751, Pt. IV, § 20, 21; Cal., Statutes 1913, ch. 320, § 87 (*b*) (elective portion).

[4] Gould's Case, 215 Mass. 480, 484, 102 N. E. 693 (1913); Keyes-Davis Co. *v.* Alderdyce, Detroit Legal News, May 3, 1913, 3 N. C. C. A. 639 n. (1913); Croad *v.* Paraffine Paint Co., 1 Cal. Ind. Acc. Comm. Dec., 2 (1914) 10. *Cf.* limitation by express language in the act to injuries, etc., occurring within the state: Nev., Laws 1911, ch. 183, § 3; Wash., Laws 1911, ch. 74, § 3; Wis., Laws 1911, ch. 50, § 1; Pa., P. L., 1915, 758, § 30.

[5] Ives *v.* S. Buffalo Ry. Co., 201 N. Y. 271, 285, 94 N. E. 431 (1910); Smith, "Se-

point out that liability in tort for personal injury depends in the main upon the element of negligence or wilful fault attributable in law to the defendant.[6] On the other hand, compensation rights and duties are based solely on the fact of injury or death suffered under the stated conditions of the employment; these are wholly divorced from the element of negligence or wilful fault on the part of the employer.

Some have professed to regard compensation as a form of taxation.[7] But in the great majority of jurisdictions the general taxing machinery of the state is not called into use, no general fund for the purpose is collected, and the payment of compensation is a private matter between employer and employee subject in greater or less degree to the approval of a state commission. Even if it be regarded as taxation, this ignores the purpose and method. In both of these fundamental respects workmen's compensation is a kind of insurance, and it is most frequently regarded as such, optional or compulsory according to the statute.[8]

The enforcement of rights under an ordinary private contract of insurance against accidental injury or death is not limited, in the absence of special provisions, to injury or death occurring in the jurisdiction wherein the contract was made.[9] The obligation to fulfil the principal terms of a unilateral contract such as insurance arises in the first instance from the terms of the contract itself; the agreement of the parties becomes by force of the controlling law a binding obligation. The question is not that of a

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quel to Workmen's Compensation Acts," 27 HARV. L. REV. 235, 344; N. Alaska Salmon Co. *v.* Pillsbury, 162 Pac. 94 (Cal.) (1916).

[6] *Cf.* Smith, "Tort and Absolute Liability — Suggested Changes in Classification," 30 HARV. L. REV. 241, 319.

[7] Cunningham *v.* N. W. Improvement Co., 44 Mont. 180, 119 Pac. 554 (1911); BOYD, WORKMEN'S COMPENSATION, §§ 67, 70, 83, 87, 88, 91. *Cf.* Borgnis *v.* Falk Co., 147 Wis. 327, 133 N. W. 209 (1911); *In re* Farrell, 211 Fed. 212 (1914); Mountain Timber Co. *v.* State of Washington, 243 U. S. 219 (1917).

[8] Ross *v.* Ericksen Constr. Co., 89 Wash. 634, 155 Pac. 153 (1916); Perlsburg *v.* Muller, 35 N. J. L. J. 202 (1912); 1 BRADBURY, WORKMEN'S COMPENSATION, 1 ed., 47, 48; SALMOND, TORTS, 2 ed., 101; POLLOCK, TORTS, 9 ed., 109.

[9] In Millard *v.* Brayton, 177 Mass. 533, 59 N. E. 436 (1901), a contract of insurance was made in Massachusetts and contemplated payment of premiums and principal sum in New York. It was held that the rights of the parties were to be governed by the law of Massachusetts. *Accord:* Equitable Life Assur. Soc. *v.* Clements, 140 U. S. 226 (1891); N. Y. Life Insur. Co. *v.* Cravens, 178 U. S. 389 (1900); 1 COOLEY, BRIEFS ON THE LAW OF INSURANCE, 559.

breach of contract, but rather the creation of the primary obligation contemplated by a unilateral contract.

There are three theories prevalent regarding the law which controls contracts in general. One is that the rights of the parties depend on the law of the place where the contract was made.[10] Another theory is that these rights depend on the law which the parties to the contract choose to have govern, which is generally assumed to be the *lex loci contractus*.[11] The third is that the law of the place of the performance of the contract governs.[12] No one of these rules can be said to have the overwhelming weight of authority. The one first mentioned seems the most satisfactory, as more nearly conforming to the territorial character of our law. It is based upon the sound proposition that the law of the place where the parties enter into the agreement shall be held determinative of the rights of the parties. The intention of the parties is rarely, if ever, manifest, and this throws the door open to presumptions which have no foundation in fact. Insurance contracts seem more generally to have been interpreted by the courts under the first of these theories. The compensation decisions follow this rule.

The law applicable to the ordinary insurance contract should be held equally applicable to the special form of insurance found in the compensation acts. The act has been elected by the real choice of the parties, and it may truly be said to have become an implied but real term of the contract of hire. Compensation then becomes due upon the occurrence of injury or death wherever it happens. This conclusion is reached by the overwhelming majority of the decisions.

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[10] Carnegie *v.* Morrison, 2 Metc. (Mass.) 381, 400 (1841): "So far as this transaction constituted a legal and binding contract at all, it was, we think, by force of the law of the place of contract, operating upon the act of the parties, and giving it force as such. The undertaking, it is true, was to do certain acts in England, to wit, to accept and pay the plaintiffs' bills; but the obligation to do those acts was created here, by force of the law of this state, giving force and effect to the undertaking of the defendants' agent, and making it a contract binding on them."

[11] *In re* Missouri S. S. Co., 42 Ch. Div. 321 (1889); Liverpool & G. W. S. Co. *v.* Phenix Insur. Co., 129 U. S. 397 (1889); Hicks *v.* Maxton, 1 B. W. C. C. 150 (1907). This theory probably prevails in England and in the United States Supreme Court, although this tribunal has given expression to all three theories. Mayer *v.* Roche, 77 N. J. L. 681, 75 Atl. 235 (1909).

[12] Brown *v.* C. & A. R. Co., 83 Pa. 316 (1877); Pritchard *v.* Norton, 106 U. S. 124 (1882); Burnett *v.* Pa. R. Co., 176 Pa. 45, 34 Atl. 972 (1896).

In *Rounsaville* v. *Central R. Co.*[13] the contract of hire was made in New Jersey and the employee was injured in Pennsylvania. He brought an action in New Jersey under the optional act of that state and a recovery was allowed, the court saying: "The place where the accident occurs is of no more relevance than is the place of the accident to the assured, in an action on a contract of accident insurance, or the place of death of the assured, in an action of life insurance."

In *Grinnell* v. *Wilkinson*[14] the contract was made in Rhode Island and the plaintiff was injured in Connecticut; a recovery under the optional act of the former state was sustained, on the ground of the contractual relation of the parties. The court disagreed with the construction of similar language in the Gould Case.[15]

In *Kennerson* v. *Thames Towboat Co.*,[16] the deceased employee, a resident of Connecticut, was hired in that state by the defendant, a Connecticut corporation, and was drowned in the navigable waters of New Jersey. Recovery of compensation under the optional act of Connecticut was sustained. Apart from considerations of possible conflict with the federal admiralty jurisdiction, the recovery was based on the theory that the act became a part of the contract of hire and that the recovery sought was contractual rather than tort.

The doctrine that compensation may be recovered under the act of the state of injury, though the common law is still in force in the state of the contract, may seem to conflict with the theory that the *lex loci contractus* governs the contract. It may be difficult, perhaps impossible, to draw a fixed line between situations where the law of the place of contracting may be declared to control notwithstanding differences in contractual incidents found in the law of the place of the performance and situations where such differences are so strongly marked as to render that rule quite contrary to reason and good sense. Where the legislature has seen fit to abolish the type of legal remedies formerly prevailing there, and still prevailing in the state of the making of the contract, the

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[13] 87 N. J. L. 371, 94 Atl. 392 (1915).

[14] 98 Atl. 103 (R. I.) (1916).

[15] 215 Mass. 480, 102 N. E. 693 (1913).

[16] 89 Conn. 367, 94 Atl. 372 (1915). *Accord:* Deeny *v.* Wright Co., 36 N. J. L. J. 121 (1913); Vincent *v.* Grand Trunk R. Co., 45 Que. Super. 353.

difference has surely become so startling as no longer to countenance the applicability of the general rule. It is always competent for the sovereign to prescribe the incidents of a contract to be performed within its territory; specific provisions should, therefore, govern. It follows that whether the statute is optional or compulsory is quite immaterial. Under the optional type of case the result is that a new contract is created when one or both of the parties cross the state line and thus subject themselves to the act. This is no more offensive to sound reasoning, it deals no more in vacant fiction than the notion of a statute becoming an implied but real term of a contract of hire originally made within that jurisdiction. The whole doctrine is somewhat novel, but only because the optional statute is itself a novelty or at least a rarity. It will be seen that a different conception must be invoked, though the ultimate result be the same, in considering the compulsory type of statute.

It may be objected that the public policy of the state where the injury or death is suffered is opposed to the principle of workmen's compensation, in the absence of such an enactment. All reported holdings are to the contrary.[17] It has also been suggested that the compensation act of the state of employment cannot confer a remedy for injury received in another jurisdiction because compensation is in the nature of a penalty.[18] This is clearly a misconception of the nature of the right, at least under the optional acts, since it is not created irrespective of consent or for failure to fulfil any legal duty. It is clear, however, that a penalty, as distinguished from compensation benefits, imposed by the home state for failure to pay such benefits cannot be enforced abroad.[19]

The question of the enforcement of the primary right, once the conditions precedent to its creation are claimed to have been ful-

[17] Albanese *v.* Stewart, 78 Misc. 581, 138 N. Y. S. 942 (1912); Pensabene *v.* Auditore Co., 78 Misc. 538, 138 N. Y. S. 947 (1912); Wasilewski *v.* Warner Sugar Refin. Co., 87 Misc. 156, 149 N. Y. S. 1035 (1914). In Reynolds *v.* Day, 79 Wash. 499, 140 Pac. 681 (1914), an action for personal injuries received in another state where the common law still prevailed was brought in Washington, where there was a compensation act in force; the policy of Washington was declared not to be opposed to the bringing of such common-law action.

[18] 83 CENT. L. J., 127–128 (1916).

[19] Huntington *v.* Attrill, 146 U. S. 657 (1892); Taylor *v.* Western U. Tel. Co., 95 Ia. 740, 64 N. W. 660 (1895); Cody *v.* Packet Co., 15 Ohio N. P. N. S. 529 (1914), an action under the optional compensation act of Ohio of 1911.

filled, raises serious difficulties. The great majority of the acts provide special machinery of administration, such as boards of arbitration, supervision or control by state commissions, the abolition of jury trial if the matter does go to court, limitations on the right of appeal, etc. In the event of the inability of the employer and employee to agree on the compensation payable, they must make use of this special machinery; and that can in the main be done only in the home state.[20]

The converse situation is presented when the contract is made in a state where the common-law system still prevails and the loss is suffered in a state where there is an optional act in force. Here too there may be a recovery of compensation, for the contract exists as well in the state of injury as in that where it was made, and becomes equally subject to the act. If affirmative notice is required, it would first have to be given to bring the parties under the act. The leading case on this aspect of the question is *American Radiator Co.* v. *Rogge*,[21] where it appears that the contract was made in New York, at a time when there was no compensation in effect there, and the injury was received in New Jersey. A recovery under the act of New Jersey was sustained. The court said:

"The act makes no distinction between cases where that relationship (employer and employee) is created by a contract made in New Jersey and a contract made in another state. . . . We find no evidence in this case of any term in the New York contract that prohibits the applicability of the New Jersey statute. . . . It is open to the employer under the New York contract to prevent the operation of Section 2, if he wishes, by notice; if he fails to give that notice, and undertakes to perform the contract in New Jersey, he voluntarily subjects himself to our law and is governed by it."

[20] Galveston, H. & S. A. Ry. Co. *v.* Wallace, 223 U. S. 481, 490 (1912): "Where the statute creating the rights provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right." In Lehmann *v.* Ramo Films, Inc., 92 Misc. 418, 155 N. Y. S. 1032 (1915), action was brought in New York under the New Jersey compensation act; it was held that this action could not be brought in New York, as the New Jersey act provides that the action shall be brought in the New Jersey courts. *Accord:* Slater *v.* Mexican Nat. R. Co., 194 U. S. 120 (1904); Erickson *v.* Nesmith, 4 Allen (Mass.) 233 (1862); Lowry *v.* Inman, 46 N. Y 119 (1871); Russell *v.* Pac. Ry., 113 Cal. 258, 45 Pac. 323 (1896); Young *v.* Farwell, 139 Ill. 326, 28 N. E. 845 (1891): Finney *v.* Guy, 111 Wis. 296, 87 N. W. 255 (1901). *Cf.* WORKMEN'S COMP. ACT OF VERMONT, ACTS 1915, ch. 164, § 42.

[21] 86 N. J. L. 436, 92 Atl. 85, 94 Atl. 85 (1914).

A dissenting opinion held that the law which controls a contract is the law which the parties intended or may be presumed to have intended, and that there was no finding by the trial court that the parties intended the New Jersey act to apply. This would not seem sound in view of the fact that that act expressly establishes a rule of presumption of the intention of the parties to contracts under regulation of that act.

In *Johnson* v. *Nelson* [22] the plaintiff had been engaged by the defendant in Minnesota and had been injured in Wisconsin, the compensation act of which state the defendant had accepted. The action before the court was one at common law for a tort. Judgment was rendered for the defendant on a motion on the ground that the remedy provided by the compensation act of Wisconsin excluded the right to bring a common-law action for tort and that the law of Wisconsin controlled the rights of the parties.

If the employee seeks recovery under the common law of the state of injury in the absence of any act there rather than under the compensation act of the state of contract, this statute cannot be interposed as a bar. To permit this would conflict with the established rule that in matters of tort the *lex loci delicti* governs. If after recovery of such common-law damages, he then also sought compensation under the act of the home state, he would be precluded by the universal provisions of the compensation acts which make the right to compensation and to damages alternative and reciprocally exclusive. So long as the right to compensation be assumed to have been created for an injury received abroad, it seems difficult to believe that such provisions would be held applicable only to common-law actions prosecuted or recovery obtained at home. If he first sought and obtained compensation under the act of the state of the contract, and then sued for damages under the common-law of the state of the injury, a situation would arise in which there would be no statutory declaration against a double recovery. The remedy which the employee would then be seeking could not be affected by the statute law of another state, where the contract happened to have been made. At least three types of cases are analogous. In ordinary insurance contracts against accident or death, the prior receipt of insurance

[22] 128 Minn. 158, 150 N. W. 620 (1915). *Accord:* Pendar *v.* H. & B. Amer. Mach. Co., 35 R. I. 321, 87 Atl. 1 (1913).

is no defense to the defendant sued by the insured in tort,[23] nor is the insurer subrogated to the rights of the insured against the tortfeasor.[24] On the other hand the prior receipt of damages is not a defense to the insurer in an action by the insured on the policy.[25] This rule, however unsatisfactory its reasoning be regarded, is firmly established and has been carried over into the law of compensation. It has been held in a number of well-considered cases that as damages and compensation are of utterly different nature, the prior receipt of one is no defense either to employer or tortfeasor in an action for the other.[26] In each of these types, really only variations of the same principle, the insured (the employer) and the tortfeasor are different persons; but in the case now under consideration the second proceeding is against the same person. Here the rule against double recovery from the same person for a single loss should be held to apply. It is true that compensation is a remedy based upon the contract and damages remedy for tort. Nevertheless the employee has suffered but a single injury, and he or his dependents are now seeking a double recovery from the same person, who should not be required to respond twice. No decisions on this point have been found.[27]

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[23] Nussbaum *v.* Trinity, etc. Ry. Co., 149 S. W. 1083 (Tex. Civ. App.) (1912); Harding *v.* Townshend, 43 Vt. 536 (1871); L. E. & W. R. Co. *v.* Falk & P. Ins. Co., 62 Ohio St. 297, 56 N. E. 1020 (1900); Clune *v.* Ristine, 94 Fed. 745 (1899); West. & Atl. R. Co. *v.* Meigs, 74 Ga. 857 (1885); Sherlock *v.* Alling, 44 Ind. 184 (1873); Hayward *v.* Cain, 105 Mass. 213 (1870).

[24] Mobile Life Ins. Co. *v.* Brame, 95 U. S. 754 (1877); Conn. Mut. Life Ins. Co. *v.* N. Y., N. H. & H. R. Co., 25 Conn. 265 (1857); 1 COOLEY, BRIEFS ON THE LAW OF INSURANCE, 3904–3905; SHELDON, SUBROGATION, § 239.

[25] Ætna Life Ins. Co. *v.* J. B. Parker & Co., 30 Tex. Civ. App. 521, 96 Tex. 287 (1903).

[26] Perlsburg *v.* Muller, 35 N. J. L. J. 202 (1912); Newark Pav. Co. *v.* Klotz, 85 N. J. L. 432, 91 Atl. 91 (1914); Jacowicz *v.* Del., L. & W. R. Co., 87 N. J. L. 273, 92 Atl. 946 (1915); Biddinger *v.* Steininger-Taylor Co., 25 Ohio Dec. 603 (1915).

[27] But *cf.* Roundsaville *v.* Central R. Co., 87 N. J. L. 371, 374, 94 Atl. 392 (1915): "If it be said that the Pennsylvania law may provide a different scheme of compensation, and that the effect of our decision may be to allow a double recovery, we can only say that questions of that kind had better be dealt with as they arise, and in the light of the exact scheme of compensation that may be involved. It is enough for the present to say that recovery of compensation in two states is no more illegal, and is not necessarily more unjust than recovery upon two policies of accident or life insurance."

The court, however, fails to distinguish between the theory expressed in actions arising upon ordinary life and accident policies that no exact monetary value can be set upon life and limb (see notes 23, 24, and 25, *supra*), and the theory of compensa-

If there are optional acts in both states there could be no recovery under both acts. Not only would this be a situation for the application of the rule against double recovery, but the matter would be *res adjudicata*. The recovery already had must have been based on a finding that the contract of employment brought in question in the second proceeding was made in contemplation of one of the two statutes; a second recovery under the other statute would have to be based on a contrary holding which would be a denial of full faith and credit under the Fourth Amendment of the federal Constitution.[28] If the second court should find there were two different contracts of hire between the same parties, there would not necessarily be a denial of full faith and credit, but the rule against double recovery, even under separate rights, would apply. The result should be the same whether one or both of the statutes are compulsory.

B. The Compulsory Statutes

The acts of some few American states impose the obligation to pay compensation irrespective of any actual or presumed consent. The nature of compensation is not changed by the mere fact that it becomes payable solely by fiat of law and irrespective of the consent of the parties to the contract of hire; it is still insurance. As the overwhelming majority of the acts are optional, it is to be expected that there should be but few decisions on this question under the compulsory acts. Although the British act is of this latter type the decisions under it afford no help, as they hold that the act was not intended, by its terms, to have extraterritorial effect. In *Hicks* v. *Maxton*[29] an English resident was taken by her English employer under a contract made in England to work in France and was there injured. It was held that there was nothing in the contract to show that the parties intended the law

tion for the ascertained economic loss of money wages only. The second recovery at most could only be of the percentage of wages not covered by the statute under which the first recovery was had.

[28] Fauntleroy *v.* Lum, 210 U. S. 230, 237 (1908): "A judgment is conclusive as to all the *media concludiendi* . . . ; and it needs no authorities to show that it cannot be impeached either in or out of the state by showing that it was based upon a mistake of law." *Accord:* Amer. Express Co. *v.* Mullins, 212 U. S. 311, 314 (1908); Sistare *v.* Sistare, 218 U. S. 1 (1910); Spencer *v.* Brockway, 1 Ohio 259 (1824).

[29] 1 B. W. C. C. 150 (1907).

of England to govern and that therefore there could be no recovery under the act. In *Tomalin* v. *S. Pearson & Son*[30] both parties to the contract were English residents, and the deceased was sent out from England to work at Malta and was there killed. It was held that the act does not operate abroad and the decision turned on the construction of the act. None of these cases discuss the extra-territorial power of the legislature.

The New York courts, however have gone squarely on record in support of a right to compensation under the compulsory act of that state by reason of injury received abroad in the course of employment under a contract of hire made in New York. In *Matter of Post* v. *Burger & Gohlke*[31] the employer and employee were both citizens of New York and the contract was made there; the plaintiff suffered injuries while at work in New Jersey, and a recovery of compensation under the New York act was sustained by the Court of Appeals, in whose opinion it was said: "It is well settled that the legislature has the power, in a case like that now under consideration, to compel a contract between employer and employee that is extraterritorial in effect." All the arguments in favor of the compensation as against the common-law system were rehearsed, and the decision was based on the conclusion that the statute becomes a true term of the contract of hire. The effect of the act was explained thus:

"The act, in view of its humane purpose, should be construed that in every case of employment there is a constructive contract, general in its terms, and unlimited as to territory, that the employer shall pay as provided by the act for a disability or death of the employee as therein stated. The duty under the statute defines the terms of the contract. . . . If the relation between the employer and employee is contractual the contract should be construed as binding upon both parties thereto without limitation as to territory the same as all ordinary contracts, based upon mutual agreement independent of statutory duty."

[30] 100 L. T. 685, 2 B. W. C. C. 1 (1909). *Accord:* Schwartz *v.* India Rubber, etc. Co. [1912] 2 K. B. 299, 5 B. W. C. C. 390.

[31] 216 N. Y. 544, 111 N. E. 351 (1916). But *cf.* Gardener *v.* Horseheads Construction Co., 171 App. Div. 66, 156 N. Y. Supp. 899, holding that where a New York contract contemplated work entirely outside the state it was not within the New York act, and there could be no recovery of compensation for injury suffered in Pennsylvania. The decision was based upon the assumed intention of the legislature, payrolls on jobs outside the state not being used as a basis for computing the employer's insurance premiums.

In the earlier case of *Spratt* v. *Sweeney & Gray Co.*,[32] there was a similar holding based principally on the argument also stated in the Post Case, that as the cost of insurance under the act to any given New York employer is determined by considering all the employees and the total of their wages, and not merely those employed in New York, the act therefore may have the effect claimed for it as to disability and death suffered abroad. The argument is not entitled to weight beyond the field of determining the intention of the legislature, for the problem here is one of legislative power. A dissenting opinion in the Spratt Case was based on the statement that the recovery sought was in the nature of a tort and that the act was not intended to operate extraterritorially. It was said that: "The liability created by the act is thus imposed by law upon the parties, so that the contract, if any there be, is one not freely entered into, such as is the ordinary contract of insurance. The act is a compulsory one in this state."

In *Gooding* v. *Ott*,[33] an action under the optional act of West Virginia, there is a dictum: "Where the statute compels submission by the employer and employee, there is no contract, as a general rule, enforceable outside of the state."

Where the common law or the compensation act of the state of injury is considered, in addition to the right to compensation for injury abroad under the result reached in the Post Case, the result should be the same as under an optional act. The employee or his dependents could not be deprived of rights acquired under the law of the state of injury by reason of the fact that rights had also been acquired under the law of the state where the contract was made. But rights could not be asserted under both to the double loss of the employer; recovery of compensation or damages would bar any attempt at further recovery. Again, there are no reported decisions.

The theory of the Post Case is that the legislature has power to compel a contract between employer and employee to which there shall be no territorial limits.[34] It is submitted that although the

[32] 168 App. Div. 403, 153 N. Y. Supp. 505 (1915).

[33] 87 S. E. 862 (W. Va.) (1916).

[34] In the Post Case the court also relied on cases arising in the maritime law, wherein the law of the place of the making of the contract is held to be controlling, even to the granting of a remedy. These decisions are clearly not in point; they merely hold that the law obtaining on a vessel is the law of its home port, the vessel

decision for the plaintiff (employee) was correct, this conception of the relation between the parties is unsound, for a "contract" imposed by law is no contract at all. An optional act becomes truly a term of the contract; but the consensual act of the parties in making the contract of hire cannot be held a consent to the compulsory act itself. On this point there has been no *aggregatio mentium*.[35] To reply that the law will presume that every contract

being inaccurately termed "floating territory" of the flag it flies. Under these decisions a remedy exists under the home law for an injury suffered on board the vessel wherever she may happen to be at the time. The rule is confined to maritime law. *Cf.* Crapo *v.* Kelly, 16 Wall. 610 (1872); McDonald *v.* Mallory, 77 N. Y. 546 (1879); Schweitzer *v.* Hamburg-A. P. A. G., 78 Misc. 448, 138 N. Y. S. 944 (1912); Edwardsen *v.* Jarvis Light Co., 168 App. Div. 368, 153 N. Y. Supp. 391 (1915). In Foley *v.* Home Rubber Co., 89 N. J. L. 474, 99 Atl. 624, the widow of a traveling salesman recovered compensation under the New Jersey act for the death of her husband upon the *Lusitania*.

[35] The People *ex rel.* Dusenbury *v.* Speir, 77 N. Y. 144 (1879). The court was called upon to decide whether the judgment for the enforcement of which these statutory proceedings were instituted was founded upon contract, express or implied, or resulted from a suit which had for its cause of action a claim for damages, for the non-performance of a contract. The judgment in question had been rendered upon the finding of a fraudulent procuring and withholding of money. The court below upheld such statutory proceedings. The Court of Appeals reversed this holding on the ground that there was no contract, express or implied, saying (page 150):

"On the contrary we think that the express contract referred to in the statute is one which has been entered into by the parties, and upon which if broken an action will lie for damages, or is implied, when the intention of the parties if not expressed in words, may be gathered from their acts, and from surrounding circumstances; and in either case must be the result of the free and *bonâ fide* exercise of the will, producing the '*aggregatio mentium*'; the joining together of two minds, essential to a contract at common law. There is a class of cases where the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right, and the other should be subject to a liability similar to the rights and liabilities in certain cases of express contract. Thus, if a man has obtained money from another, through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back, for the *law* implies a promise from the wrongdoer to restore it to the rightful owner, although it is obvious that this is the very opposite of his intention. Implied or constructive contracts of this nature are similar to the constructive trusts of courts of equity, and in fact are not contracts at all"; and on page 151: "The court below expressly puts the obligation upon the mere authority of the law, and makes a contract 'by force of natural equity.' The learned judge says: 'the law implied a promise to pay over, as the judgment directed that to be done.' So obligations are created in consequence of frauds or negligence, and in either case the law compels reparation, and permits the tort to be waived, but there is no contract. That can only come from a convention, or agreement of two, not by the option, or at the election of one. In the case before us there is not even an election, for the complaint states no contract, nor charges any assumpsit."

of hire made in a state where there is a compulsory statute is made in contemplation of that statute, or that the law will not permit the parties to show that their contract expressly repudiates the act, begs the question. A compulsory act cannot in any true sense be a part of the contract merely by reason of its existence upon the statute books, but can only impose an obligation, law-created, upon the fulfilment of the conditions stated. Once concede that there is a true contract for extraterritorial operation of the law, and the difficulty is avoided, the remedy clear on the sound reasoning of the cases previously discussed under the optional acts. But in truth there is no contract, no agreement.

Cases arising under the common-law doctrine of assumption of risk before compensation acts had been thought of in common-law countries furnish an interesting analogy to the present problem. That defense was commonly, and by some courts still is, considered a matter of implied but real contract.[36] The similar defense of the common employment may be considered with this. If these defenses were truly matters of contract, the rights arising out of an injury to an employee would be controlled by them wherever the injury was received, if the law of the place of the contract were deemed the governing law. Thus for an injury received in state A. by an employee working under a contract made in state B., one should look to the law of B. for the existence of these rights as determining their extent and applicability as defenses. To answer that the common-law action for personal injuries is one sounding in tort and is therefore determined wholly by the *lex loci delicti* begs the question, which concerns supposedly affirmative defense arising as matters of contract. These cases, however, all hold that these defenses are not matters of contract, nor determined by the *lex loci contractus*. In *Alabama Great Southern Ry. Co.* v. *Carroll*[37] the plaintiff entered the employ of the defendant in Alabama, where there was in force an employers' liability statute, and was injured by the negligence of a fellow servant in Mississippi. He sued the railroad in Alabama relying upon that statute, and it was urged that by the contract of hire this act had become a part of

[36] Narramore *v.* C. C. C. & St. L. Ry. Co., 96 Fed. 298, 301 (1899); C. B. & Q. R. Co. *v.* Shalstrom, 195 Fed. 725, 729 (1912); Seaboard Air Line *v.* Horton, 233 U. S. 492, 504 (1913); Railway Co. *v.* Ranney, 37 Ohio St. 665, 669 (1882).

[37] 97 Ala. 126, 11 So. 803 (1892).

the contract, and that the rights and liabilities of the parties were to be dertermined by it. The court repudiated this notion flatly. The same question was presented in *Kansas City, Ft. S. & M. R. Co.* v. *Becker*,[38] except that here the action was brought in the state where the injury occurred. The court held that the action was to be governed by the law of the place of injury, saying: "It is true that the relation was created by contract, but the duty upon which the appellee relies to recover in this action, if it existed, was imposed by law, and arose from the relation, rather than from the contract." In the Carroll Case the court said: "The courts of no other sovereignty can impute a damnifying quality to an act or omission which afforded no cause of action where it transpired."

The eminently sound principle of these cases, that law-imposed duties are not matters of contract to govern abroad the incidents of contractual relations, is equally applicable to the reasoning employed to sustain a recovery for injury abroad under a compulsory compensation act. The duty to pay compensation was no more contractual, under the New York act considered in the Post Case, than the duty to provide safe facilities for work under an employers' liability act. Further legislative encroachment upon the old field of unrestrained contract is to be expected, and it cannot be worked out satisfactorily upon a basis of the survival of the legal philosophy which attempted to reduce all legal relationships and duties to those of contract. In this instance the archaism of a fictitious term of the contract of hire is unnecessary and confusing.

In a recent case [39] the Supreme Court of California held that the compulsory portion of the compensation act of that state was not intended by the legislature to give a remedy for injury or death abroad. The court also considered the question, here discussed, of the nature of the correlative rights and duties under such a compulsory act. The New York Court of Appeals had dodged the question by treating the matter as entirely one of contract; the California court held squarely and, we think, properly, that these

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[38] 57 Ark. 1, 39 S. W. 358, 53 S. W. 406 (1899). *Accord:* B. & O. S. W. Ry. Co. *v.* Jones, 158 Ind. 87, 62 N. E. 994 (1901); Indiana I. & I. R. Co. *v.* Masterson, 16 Ind. App. 323, 44 N. E. 1004 (1896); DRESSER, EMPLOYERS' LIABILITY, § 3; WHARTON, CONFLICT OF LAWS, § 478 *b*.

[39] North Alaska S. Co. *v.* Pillsbury, 162 Pac. 93 (Cal.) (1916).

rights and duties are not contractual, but are imposed by law upon the contractual status of employer and employe. It is only to be regretted that the statute was not found to intend an extraterritorial effect, loosely speaking, in order that this court might also have considered whether such intention could successfully be worked out under our American constitutions. On the principal point the court reasoned thus:

"The case is before us on rehearing. Our former decision, upholding the jurisdiction of the commission (to make an award for an injury abroad to an employee hired in California), was based on the theory that the workmen's compensation law entered into and became a part of the contract of employment, and that, where such contract was made in this state, the statute fixed the rights of the parties with respect to any injuries arising out of the employment, wherever such injuries might occur.

"Upon further study, we are satisfied that this view is not tenable. The liability of the employer to pay compensation arises from the law itself, rather than from any agreement of the parties. The law operates upon a status, *i.e.* that of employer and employee, and affixes certain rights and obligations to that status. True, the relation of employer and employee has its inception in a contract, but; once that relation is created, its incidents depend, not upon the agreement of the parties, but upon the provisions of the law. Our decisions upholding the validity of this legislation have emphasized, and found support in the proposition that the statute is one regulating the rights and obligations attaching to the status of employer and employee. . . . If the right to compensation rested upon contract, it would seem to follow that such right would exist only in cases of employment under agreements made after the passage of the statute. . . . It may well be said that the rights declared by an elective statute have their origin and sanction in the agreement of the parties to be bound by the statute. Under a compulsory statute, however, the correlative rights and obligations are not founded upon contract. Nor do they correspond with the legal conception of a tort, since a liability is imposed without regard to the element of wrongdoing on the part of the person charged. The obligation is to be defined as a statutory one, attached by law to a given status."

If the reasoning of the Post Case be unsound and the obligations and rights be law-imposed, irrespective of consent, how can the result there reached be upheld? Sustaining the right to compen-

sation for injury abroad seems to substitute for our Anglo-Saxon territorial system one based upon or analogous to the personal theory that a citizen carries his law with him wherever he goes. This is *pro tanto* legislating for another jurisdiction. It would seem clear that our constitutions will not permit the legislature of one state to legislate for another, to impose rights and duties solely by reason of events occurring abroad; the territorial conception is too deeply ingrained.

If the statute is in form and substance a genuine regulation of contracts subject to its sovereignty, the statute may then constitutionally be found to intend a recovery for injury abroad. The legislature may lawfully impose that right and duty upon those operating under a contract subject to that legislative power. The older line of cases at common law and under the employers' liability statutes, while sound, is not conclusive here. The law touching these duties, or so-called defenses, was not a regulation of contracts, but an expression of positive duties for the breach of which recovery could be claimed only on the basis of tort, which is conceded to be a matter for the exclusive regulation of the jurisdiction wherein the defendant's responsible act or omission took place.

Of the compulsory acts now in force in the United States, that of Washington,[40] by its express terms is confined to injuries suffered within that state. The California act has been noted. The Ohio act [41] seems to be a genuine regulation of contracts, as it provides that "every employee . . . who is injured . . . in the course of employment, wheresoever such injury has occurred . . . shall be entitled to receive . . . from his employer . . . such compensation," etc.; and it defines both employer and employee in terms of "any contract of hire, express or implied, oral or written." The New York act [42] is not so clearly in form a regulation of contracts, the only explicit reference to the contract of hire occurring in sect. 3 (9): "'Wages' means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident," etc. In substance, however, the act could probably be construed as a regulation of contracts, and the decisions giving it extraterritorial effect thus supported.

[40] LAWS 1911, ch. 74, § 3.

[41] General Code, §§ 1465–68; Acts 1913, Senate Bill, 48.

[42] LAWS 1914, ch. 41.

The notion of a compulsory statute as a contract cannot satisfy us in this day; the new and growing categories of law-imposed duties cannot be twisted into the older and simpler classifications of contract and tort. On the other hand legislatures cannot substitute personal for territorial law. Fortunately we may support the imposition of the new duties for injury and death suffered in another jurisdiction as a regulation of contracts. Due process is not defeated by the legislature imposing on contracts subject to it the same duties and rights, as incidents to acts abroad, that are lawfully imposed as incidents to the same acts occurring within the geographical limits of its sovereignty. Whatever be the reasoning employed, other courts will doubtless reach the same result as did the Court of Appeals of New York.

Reverting to the general situation already discussed of "conflict" between the remedies of the state of contract and the remedies of the state of injury, it is clear that the compulsory or optional character of one or both of the statutes cannot affect the limitation of the single recovery. If both statutes are optional, the similarity of remedies offered might conceivably permit the application of the *lex loci contractus;* but as it is difficult to conceive of one jurisdiction refusing to hold supreme its declared legislative policy, this would undoubtedly be found to apply, on the theory already advanced in support of the control by the optional act of the state of injury as against the common law of the state of the contract. If the first statute is compulsory the duty under it cannot be set aside, though it continues everywhere, by an optional or compulsory act in the jurisdiction of the loss; alternative remedies exist, both of which may not be enforced for a single loss.

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